

## Message Text

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11  
ACTION EUR-25

INFO OCT-01 ADP-00 EB-11 ACDA-19 IO-13 CIAE-00 PM-07

INR-10 L-03 NEA-10 NSAE-00 PA-03 RSC-01 PRS-01

USIA-15 TRSE-00 MBFR-03 SAJ-01 DODE-00 SS-15 NSC-10

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FM USMISSION BERLIN  
TO AMEMBASSY BONN PRIORITY  
INFO SECSTATE WAASHDC PRIORITY 2140  
AMEMBASSY LONDON  
MAEMBASSY MOSCOW 6179  
AMEMBASSY PARIS  
USMISSION NATO

C O N F I D E N T I A SECTION 1 OF 2 BERLIN 1281

E.O. 11652: GDS  
TAGS: PGOV, WB, UR, GW  
SUBJECT: SOVIET AIDE MEMOIRE ALLEGING QA VIOLATION

REF: A. MOSCOW 8745 B. BONN 2006

1. SUMMARY: ALLIES HAVE BEEN KEPT FULLY APPRISED OF DEVELOPMENT OF DRAFT PENAL CODE REFORMATION AND ARE PRESENTLY CONSULTING WITH SENAT ON BERLIN ASPECTS. WE RECOMMEND THAT BONN GROUP CONSIDER PREPARATION OF BRIEF REPLY WHICH WOULD INDICATE ALLIES SHARE SOVIET INTEREST IN FAITHFUL OBSERVANCE OF QA AND ASSURE THEM THAT ALLIES WILL CONTINUE TO EXERCISE THEIR RESPONSIBILITIES, BUT WHICH WOULD NOT RESPOND IN DETAIL TO PARTICULAR SOVIET CHARGES. END SUMMARY.

2. WE ARE IMPRESSED AT SOVIET DILIGENCE IN WORKING THROUGH 466-PAGE BUDES RAT PRINT OF FRG'S DRAFT PENAL CODE REFORM LAW. DRAFT LAW HAS BEEN UNDER PREPARATION AT LEAST SINCE EARLY DAYS OF PREVIOUS BUDESTAG. BONN GROUP  
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HELD PRELIMINARY DISCUSSIONS ON BERLIN CLAUSE ASPECTS

YEEAR AGO AND SENAT HAS KEPT MISSION LEGAL ADVISERS ABREAST OF LAW'S PROGRESS THROUGH VARIOUS LEGISLATIVE STAGES. CHANCELLERY OFFICIAL (HEIDELMEYER) TOLD LEGAL ADVISERS JULY 18 THAT IT NOW EXPECTED LEGISLATION TO BE ADOPTED IN BONN EARLY IN FALL, AND OFFICE OF SENATOR FOR JUSTICE HAS PROMISED TO PROVIDE DETAILED MEMORANDUM ON BERLIN CLAUSE QUESTIONS.

3. PENDING RECEIPT OF SENAT MEMORANDUM AND OPPORTUNITY TO STUDY IN DETAIL AMENDMENTS OF SPECIFIC LAWS WHICH DRAFT LEGISLATION PROPOSES BE EXTENDED TO BERLIN, WE HAVE NUMBER OF PRELIMINARY OBSERVATIONS ON SOVIET AIDE MEMOIRE. SOVIET DESCRIPTION OF DRAFT LAW IS GREATLY OVERSIMPLIFIED. BASIC FLAW IN SOVIET PRESENTATION IS THAT IT IGNORES DISTINCTION ALLIES HAVE SCRUPULOUSLY PRESERVED, THAT BERLIN CLAUSE ON LEGISLATION DOES NOT MAKE IT FRG LEGISLATION FOR BERLIN. RATHER IT IS BERLIN HOUSE ACTION, SUPERVISED BY ALLIES, WHICH GIVES LAW VALIDITY HERE. THIS POINT REBUTS BASIC CHARGE THAT FRG IS IMPROPERLY SEEKING TO EXERCISE DIRECT AUTHORITY OVER BERLIN. DRAFT LAW ALSO MAKES CONSIDERABLE EFFORT TO APPLY TO BERLIN ONLY AMENDMENTS OF THOSE LAWS WHICH ARE ALREADY EFFECTIVE HERE PURSUANT TO ALLIED AUTHORIZATION. THUS ARTICLE 297, WHICH SOVIETS CITE AS CONTAINING MATERIAL PREJUDICIAL TO QA, SPECIFICALLY PROVIDES THAT VARIOUS ARTICLES WILL NOT BE EXTENDED TO BERLIN AND EXPLANATORY NOTES MAKE CLEAR THAT THIS IS BECAUSE, IN MATTERS ADDRESSED BY THESE ARTICLES, BASIC LEGISLATION THAT PENAL CODE REFORM LAW IS CHANGING IS NOT VALID IN BERLIN.

4. AT SAME TIME, WE ARE NOT PREPARED TO SAY THAT NONE OF THE SPECIFIC PROBLEMS CITED BY SOVIETS HAVE ANY VALIDITY. ARTICLE 29, WHICH AS SOVIETS POINT OUT, CONTAINS SOME MINOR AMENDMENTS TO LAW ON THE FEDERAL CONSTITUTIONAL COURT, IS NOT ONE OF THOSE WHICH IS SPECIFICALLY EXCEPTED WITH RESPECT TO BERLIN BY ARTICLE 297. WHILE WE HAVE ALWAYS CONSIDERED THAT AMENDMENT TO LAW WHICH HAS NOT BEEN TAKEN OVER IN BERLIN CAN NOT BE GIVEN REAL EFFECT IN BERLIN EVEN IF AMENDMENT WERE TECHNICALLY TO BE TAKEN OVER, FAILURE TO EXCEPT ARTICLE 297 IS NOT VALID IN BERLIN.

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29 SPECIFICALLY IS PROBABLY OVERSIGHT WHICH IT WOULD BE BEST TO CORRECT. THIS CAN BE DONE EITHER IN BUDESTAG OR THROUGH BK/O WHEN ALLIES APPROVE PENAL CODE REFORM LAW. THAT THIS IS MERE OVERSIGHT IS SUGGESTED BY FACT THAT ARTICLE 297 SPECIFICALLY PROVIDES THAT PROPOSED CHANGE TO PARAGRAPH 84 OF STRAFGESETZBUCH, WHICH DEALS WITH DECISIONS OF THE CONSTITUTIONAL COURT, IS NOT TO BE EXTENDED TO BERLIN.

5. AT LEAST SOME OTHER SOVIET CHARGES ALSO APPEAR GROUNDLESS.  
FOR EXAMPLE, AIDE MEMOIRE OBJECTS TO PROVISIONS OF ARTICLE  
297 THAT PRESCRIBE CRIMINAL PROSECUTION IN BERLIN FOR  
ACTIVITIES AGAINST SECURITY OF FRG OR FRG CONSTITUTIONAL  
ORDER. PROVISIONS IN QUESTION, HOWEVER, ARE MERELY  
REDRAFTS OF EXISTING PROVISION OF STRAFGESETZBUCH WHICH  
HAVE LONG APPLIED TO BERLIN WITH ALLIED CONCURRENCE.  
PURPOSE OF REDRAFTS, ACCORDING TO NOTES IN FRG PRINT,  
IS MERELY TO FACILITATE READERS'S UNDERSTANDING OF  
WHICH PARTS OF STRAFGESETZBUCH APPLY TO BERLIN AND WHICH  
DO NOT. THERE ARE NO SUBSTANTIVE CHANGES. (PROVISIONS  
DEAL WITH ACTIONS ON BEHALF OF OR IN SUPPORT OF POLITICAL  
ORGANIZATIONS OR OTHER GROUPS WHICH HAVE BEEN DECLARED  
UNCONSTITUTIONAL UNDER FRG ORGANIZATIONS LAW. THIS IS  
LAW UNDER WHICH FRG RECENTLY CONSIDERED ACTING TO BAN  
CERTAIN LEFT-WING ORGANIZATIONS. IT PERMITS MINISTER FOR  
INTERIOR TO TAKE ADMINISTRATIVE ACTION TO BAN ORGANIZATIONS,  
BUT FOR THIS ACTION TO BE VALID IN BERLIN IT MUST BE  
CONFIRMED BY SENAT AND REMAINS SUBJECT TO ALLIES' ULTIMATE  
RESPONSIBILITIES FOR SECURITY. ARTICLE 297 OF DRAFT  
PENAL CODE REFORM LAW CAREFULLY DOES NOT INCLUDE IN  
REDRAFT OTHER PORTIONS OF STRAGGESETZBUCH WICH DEAL WITH  
CRIMES INVOLVING POLITICAL PARTIES THAT HAVE BEEN DECLARED  
UNCONSTITUTIONAL. THIS IS BECAUSE THAT PORTION OF  
STRAFGESETZBUCH HAS NOT BEEN EXTENDED TO BERLIN SINCE  
ACTIONS OF FEDERAL CONSTITUTIONAL COURT ARE INVOLVED.  
NET EFFECT OF ARTICLE 297, THEREFORE, IS, AS ITS  
TITLE MAKES CLEAR, TO INDICATE THAT A SPECIAL REGIME EXISTS  
FOR BERLIN WHICH IS DISTINCT FROM THAT OF FRG PROPER.)

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USIA-15 TRSE-00 MBFR-03 SAJ-01 DODE-00 SS-15 NSC-10

RSR-01 /149 W  
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P 261800Z JUL 73  
FM USMISSION BERLIN  
TO AMEMBASSY BONN PRIORITY  
INFO SECSTATE WASHDC PRIORITY 2141  
AMEMBASSY LONDON  
AMEMBASSY MOSCOW  
AMEMBASSY PARIS  
USMISSION NATO

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6. WE WOULD NOTE IN PASSING THAT WHILE SOVIETS HAVE OBVIOUSLY PUT IN VIRTUALLY EVERYTHING BUT KITCHEN SINK, THERE IS AT LEAST ONE ITEM WHICH THEY HAVE APPARENTLY MISSED, BUT WHICH ALLIES HAVE ALREADY TAKEN UP WITH SENAT. THIS INVOLVES PROVISIONS OF LAW WHICH WOULD DELETE FROM ALL EXISTING LAWS CATEGORY OF MISDEMEANOR (UNBERTRETUNG) AND REPLACE IT WITH SLIGHTLY DIFFERENT CATEGORY OF MINOR OFFENSE. THIS PROVISION HAS GIVEN US SOME CONCERN BECAUSE SENAT CONSIDERS THAT IT WOULD OPERATE TO AMEND 1928 RAILWAY LAW, WHICH REMAINS VALID ONLY IN BERLIN, AND WHICH, BY COMMON POST-WAR CONSENT OF FOUR POWERS, GOVERNS OPERATION OF REICHSBAHN IN BERLIN. WE HAVE TOLD SENAT THAT 1928 RAILWAY LAW SHOULD NOT BE AMENDED LEST DOOR BE OPENED TO GDR TO RESOPOND WITH NEW ASSERTION OF ITS CLAIM TO BE SOVIEREIGN OVER REICHSBAHN BY DEVELOPING ITS OWN CHANGES IN LAW. WE HAVE PROPOSED THAT 1928 RAILWAY LAW COULD BE INSULTATED FROM CHANGE EITHER BY SPECIFIC EXEMPTION IN TEXT OF PENAL CODE REFORM LAW OR THROUGH ALLIED BK/O WHEN LAW APPROVED FOR BERLIN.  
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7. BONN GROUP IS NO DOUBT IN BEST POSITION TO DEVELOP ACTUAL TEXT OF ALLIED REPLY, BUT WE WOULD URGE THAT REPLY SHOULD AVOID SPECIFICS LEAST SOVIETS DRAG US INTO POSITION WHERE WE ARE DEBATING DETAILS OF BERLIN LAW WITH THEM AS IF THEY WERE FOURTH MEMBER OF AK. IT SEEMS TO US THAT MUCH OF MATERIAL FOR REPLY ALREADY EXISTS IN NOTE HANDED OVER IN MOSCOW IN FEBRUARY IN RESPONSE TO SOVIET NOTE ON EXTENSION OF INTERNATION AGREEMENTS TO BERLIN (REF B). WE WOULD SUGGEST RELATIVELY BRIEF REPLY THAT MIGHT MAKE FOLLOWING POINTS:

A. ALLIES APPRECIATE AND SHARE INTEREST IN SCRUPULOUS COMPLIANCE WITH QA.

B. THEY CAN ASSURE THE SOVIETS THAT ESTABLISHED PROCEDURES CONCERNING APPLICABILITY OF FRG LEGISLATION TO WEST BERLIN REMAIN UNCHANGED AND THAT ALLIES WILL CONTINUE TO EXERCISE THEIR RIGHTS AND RESPONSIBILITIES, IN PARTICULAR

THOSE RESPECTING SECURITY AND STATUS.

C. UNDER ESTABLISHED PROCEDURES, A BERLIN CALUSE IN AN  
FRG LAW DOES NOT HAVE EFFECT OF EXTENDING LAW TO BERLIN.  
THIS OCCURS ONLY UPON LEGISLATIVE ACTION IN BERLIN, WHICH  
IS SUBJECT TO ALLIED RIGHTS AND RESPONSIBILITIES. SUCH  
A LAW THUS IS BERLIN LAW AND NOT FRG LAW.

D. ALLIES HAVE BEEN KEPT FULLY APPRISED BY FRG AND SENAT  
OF DEVELOPMENT OF DRAFT PENAL CODE REFORM LAW, AND  
SOVIETS MAY BE ASSURED THAT THEY WILL CONTINUE TO  
EXERCISE THEIR FUNCTIONS IN THE EVENT THAT LAW IS FINALLY  
ADOPTED BY FRG.BORG

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